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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

E.J.T. CONSTRUCTION CO., INC. AND NATIONAL FIRE INSURANCE COMPANY OF HARTFORD AND AMERICAN CASUALTY COMPANY OF READING,

Petitioners,

v.

UNITED STATES OF AMERICA FOR THE USE OF BILLOWS ELECTRIC COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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July 2, 1982

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT BELOW IMPROPERLY INTERPRET AND IMPERMISSIBLY EXPAND THE MILLER ACT STATUTORY LANGUAGE "SUMS JUSTLY DUE" SO AS TO PERMIT RECOVERY BY A MATERIAL SUPPLIER (PURSUANT TO AN ORAL SUBCONTRACT BETWEEN THE MATERIAL SUPPLIER AND THE SUBCONTRACTOR OF THE GENERAL CONTRACTOR) AGAINST THE GENERAL CONTRACTOR AND ITS MILLER ACT SURETIES FOR SERVICE CHARGES, EVEN THOUGH THE COURT PRECLUDED ANY CONTRACT RECOVERY AGAINST THE GENERAL CONTRACTOR AND BONDING COMPANIES UNDER THE MILLER ACT UNDER THAT SAME ORAL SUBCONTRACT.

II. DID THE COURT BELOW COMMIT ERROR IN ITS FINDINGS AND HOLDING THAT A DIRECT CONTRACTUAL RELATIONSHIP EXISTED BETWEEN THE MATERIALMAN BILLOWS AND THE GENERAL CONTRACT E.J.T. AND WAS ENTERED INTO ON OR ABOUT DECEMBER 1, 1977 THEREBY RELIEVING THE MATERIALMAN OF THE NINETY DAY NOTICE REQUIREMENT OF THE MILLER ACT CONTAINED AT 40 U.S.C. § 270b(a) AND THEREBY CONTRACTUALLY OBLIGATING THE GENERAL CONTRACT E.J.T. TO THE MATERIALMAN BILLOWS.

DESIGNATION OF CORPORATE RELATIONSHIP

E.J.T. Construction Co., Inc., National Fire Insurance Company of Hartford and American Casualty Company of Reading, Petitioners in this proceeding, filed this Petition for Writ of Certiorari and state that:

1. This is the original designation of corporate relationships.

2. E.J.T. Construction Co., Inc. is not owned by any parent corporation.

3. CNA Insurance is the parent of National Fire Insurance Company of Hartford and American Casualty Company of Reading.

4. E.J.T. Construction Co., Inc. does not have any ownership interest in any subsidiary.

5. National Fire Insurance Company of Hartford and American Casualty Company of Reading do not have any ownership interest in any subsidiary.

6. E.J.T. Construction Co., Inc. does not have any affiliates.

7. National Fire Insurance Company of Hartford and American Casualty Company of Reading are affiliates of each other and share the following affiliates: Transportation Insurance Company, Continental Casualty Company, Transcontinental Insurance Company and Valley Forge Insurance Company.

July 2, 1982

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

DESIGNATION OF CORPORATE RELATIONSHIPS ii

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS 2

STATEMENT OF CASE 3

EXISTENCE OF JURISDICTION BELOW 6

REASONS FOR GRANTING THE WRIT:

I. The Court Below Improperly Interpreted And Impermissibly Expanded The Miller Act Statutory Language "Sums Justly Due" So As To Permit Recovery By A Material Supplier (Pursuant To An Oral Subcontract Between The Material Supplier And The Subcontractor Of The General Contractor) Against The General Contractor And Its Miller Act Sureties For Service Charges, Even Though The Court Precluded Any Contract Recovery Under The Miller Act Under That Same Oral Subcontract 6

II. The Court Below Committed Error In Its Findings And Holding That A Direct Contractual Relationship Existed Between The Materialman Billows And The General Contractor E.J.T. And Was Entered Into On Or About December 1, 1977 Thereby Relieving The Materialman Of The Ninety Day Notice Requirement Of The Miller Act Contained At 40 U.S.C. § 270b(a) And Thereby Contractually Obligating The General Contractor E.J.T. To The Materialman Billows 10

CONCLUSION 12

APPENDICES:

A: Memorandum and Order, June 10, 1981, U.S. District Court 1a

B: Order, August 13, 1981, U.S. District Court 13a

Page

C: Judgment Order, May 3, 1982, U.S. Court of Appeals 15a

D: Petition for Rehearing, May 27, 1982, U.S. Court of Appeals 18a

TABLE OF AUTHORITIES

Cases:

Continental Casualty Co., Inc. v. Allsop Lumber Co., Inc., 336 F.2d 445 (8th Cir. 1964) 8, 9

D&L Construction Co. v. Triangle Electric Supply Co., Inc., 332 F.2d 1009 (8th Cir. 1964) 8, 9

F.D. Rich Co., Inc. v. United States Ex Rel. Industrial Lumber Co., Inc., 417 U.S. 116 (1974) 9, 10

United States v. Hesselden Construction Co., 404 F.2d 774 (10th Cir. 1968) 11

United States v. Liles Construction Company, 440 F.2d 474 (5th Cir. 1971) 11

United States v. Van de Riet, 316 F.2d 912 (4th Cir. 1963) 12

Statutes:

28 U.S.C. § 1254(1) (1976) 2

40 U.S.C. § 270a (1976) 2, 6

40 U.S.C. § 270b(a)(1976) 2, 10

IN THE

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OCTOBER TERM, 1981

E.J.T. CONSTRUCTION CO., INC. AND NATIONAL FIRE INSURANCE COMPANY OF HARTFORD AND AMERICAN CASUALTY COMPANY OF READING,

Petitioners,

v.

UNITED STATES OF AMERICA FOR THE USE OF BILLOWS ELECTRIC COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

E.J.T. Construction Co., Inc., National Fire Insurance Company of Hartford and American Casualty Company of Reading, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on May 3, 1983, Petition for Rehearing denied on May 27, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is unreported and is printed in Appendix A hereto, *infra*, page 15a.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit (Appendix A, *infra*, page 15a) was entered on May 3, 1982. A timely Petition for Rehearing was denied on May 27, 1982 (Appendix A, *infra*, page 18a). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTORY PROVISIONS

This case involves § 270(a) of the Miller Act, which provides as follows:

> **§ 270b. Same; rights of persons furnishing labor or material**
>
> (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act [40 USCS §§ 270a et seq.] and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship

with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

STATEMENT OF CASE

On February 16, 1978, Billows Electric Supply, Inc. (hereinafter "Billows") filed a Complaint in The United States District Court for the Eastern District of Pennsylvania pursuant to the Miller Act, 40 U.S.C. § 270a *et seq.* (hereinafter "the Miller Act") against, *inter alia*, E.J.T. Construction Co., Inc. (hereinafter "E.J.T."), National Fire Insurance Company of Hartford and American Casualty Company of Reading, Pennsylvania. This Complaint as well as the two later Complaints all joined for trial sought to recover monies which Billows claimed were due as a result of supplying material through a series of purchase order invoices pursuant to an oral contract with B.D. Thomas Company, a subcontractor of E.J.T.'s (hereinafter "Thomas"). In the second and third Complaints, Billows continued to seek

recovery as a material supplier under the Miller Act from E.J.T., the prime contractor, and its two sureties based on the oral subcontract agreement with Thomas and also sought recovery under a direct contractual relationship with E.J.T.

At trial, it was established that Brian Thomas, the principal of the Thomas Company, entered into a written subcontract agreement with E.J.T. for $600,500.00 and that in fulfilling the requirements of that contract, he purchased a major portion of his material requirements from Billows, and that he did not have a written contract with Billlows, but would order materials as needed and that the terms of payment were that if he paid his monthly bills by the 10th of a month, he would get a two percent discount and that if he paid them within thirty days, he would owe the net amount and that if he owed money at a point in time after sixty days, there was a service charge, which is the focal point of this appeal.

The testimony reflected that all invoices were always addressed and sent to Thomas, although E.J.T. did commence to receive copies at a later date, that the monthly statements which were the only notice of the service charges were never sent to E.J.T. by Billows, that Thomas would either order material in person or over the phone and that the outstanding invoices totalled $50,634.58 in principal and $38,583.38 in service charges.

The testimony further reflected that problems with payments for materials supplied by Billows to Thomas occurred so that a joint payment check procedure was thus initiated and implemented and had been in effect for some period of time. In November of 1977, a secretary of E.J.T.'s vice-president wrote a letter dated

November 28, 1977 advising that another joint check in the amount of $29,528.78 was being delivered and that no further payments for past indebtedness from Thomas to Billows would be made to Billows until all materials were delivered to the job site, a condition which E.J.T. claims was never met.

In response to the letter of November 28, 1977, Jeff Billow wrote Edward J. Troise, Jr. on December 1, 1977 and confirmed an alleged arrangement to receive payments of $10,000.00 every thirty days against the existing Thomas account and sought confirmation that all future materials shipped would be paid for within thirty days after delivery.

No further communication occurred between E.J.T. and Billows and only seven days later on December 8, 1977, Billows sent the first Miller Act notice letter to E.J.T. although Billows continued to deliver materials to the job site through Thomas and to send the monthly statements which contained the service charges to Thomas. No further monies either for existing indebtedness prior to December 1, 1977 or for shipments of material subsequent to December 1, 1977 were ever received from E.J.T. by Billows and E.J.T. never ordered any material directly from Billows.

The Court below determined, contrary to the contention of E.J.T., that a sufficient course of conduct and dealing existed to create a direct contract relationship under the Miller Act and that even though no recovery under the Miller Act otherwise was permitted on the oral subcontract between Billows and Thomas, that Billows could recover service charges which were a part of that oral subcontract against E.J.T. and the bonding companies, both of which constitute improper constructions of the Miller Act and are the subject of this appeal.

EXISTENCE OF JURISDICTION BELOW

The United States District Court for the Eastern District of Pennsylvania exercised jurisdiction in these Miller Act cases pursuant to the provisions of 40 U.S.C. § 270a, *et seq.*

REASONS FOR GRANTING THE WRIT

I.

The Court Below Improperly Interpreted And Impermissibly Expanded The Miller Act Statutory Language "Sums Justly Due" So As To Permit Recovery By A Material Supplier (Pursuant To An Oral Subcontract Between The Material Supplier And The Subcontractor Of The General Contractor) Against The General Contractor And Its Miller Act Sureties For Service Charges, Even Though The Court Precluded Any Contract Recovery Under The Miller Act Under That Same Oral Subcontract.

The Court below in a decision of sweeping significance permitted Billows to recover the undisputed amount of accumulated service charges of $38,533.38 by means of a misguided application of the Miller Act language of "sums justly due". Such a result was and is shocking to Petitioners from a factual point of view since (1) the agreement between Billows and Thomas was oral to begin with, (2) even though E.J.T. at one point in time commenced to receive invoices, these invoices did not indicate the service charge which appeared only on the monthly statements sent exclusively to Thomas, and (3) in the case of the sureties, until the actual filing of suit, there is no way they could ever have any notice of these charges.

This same result was and is also far-reaching from a legal point of view in that the Court below permits Billows to recover these monies under the Miller Act by reference back to the subcontract agreement (oral) between Thomas and Billows thus producing the inexplicable result that although Billows could not recover against E.J.T. on its main claim under the subcontract agreement with Thomas, Billows can recover service charges against E.J.T. and the sureties under that same oral subcontract agreement. This is non-following, contrary to the language, history and decided cases under the Miller Act and upsets the standards previously relied on by general contractors and surety companies under the Miller Act and substantially emasculates the existing Miller Act case law.

It is respectfully submitted that the holding of the Court below in this case (1) renders uncertain how far the liability of a general contractor and bonding company may be extended, (2) creates a heretofore unenunciated bifurcated liability where a general contractor and bonding company may be liable to a supplier or person not in privity and not otherwise meeting the Miller Act notice requirements, (3) creates the possibility of collusion between subcontractors and suppliers as to the prime contractor and bonding company, especially where as here no writing is available to the prime contractor or bonding company and (4) foments litigation by encouraging collateral litigation bottomed on the availability of inconsistent claims. It is urged that review by this Court is necessary to correct this situation since, if this result continues intact, general contractors and bonding companies cannot, until the passing of the Miller Act limitation period, ever be able to ascertain with certainty the nature and extent of their potential obliga-

tions thereunder. The Court below seriously misreads and misinterprets the Miller Act when it permits the result decreed in this case where recovery is denied under a contract because of failure to comply with notice provisions and yet imposed as to other provisions of that same contract under a theory never articulated or explained in any way.

Petitioners are unaware of any holding by any court construing the Miller Act where the same result has been reached as promulgated by the Court below.

The two cases cited by the District Court and not disaffirmed by the Court below for its startling conclusion are *D&L Construction Co. v. Triangle Electric Supply Co., Inc.*, 332 F.2d 1009 (8th Cir. 1964), and *Continental Casualty Co., Inc. v. Allsop Lumber Co., Inc.*, 336 F.2d 445 (8th Cir. 1964). The obvious distinction between *D&L, supra,* and *Continental, supra,* and the facts of this case is that in those cases, the Eighth Circuit permitted recovery of prejudgment interest where such recovery was in conjunction with a recovery under the same subcontract. In this case, to the contrary, the Court below has permitted recovery of a principal claim under an alleged direct contract and recovery of the service charges here complained of pursuant to a completely separate oral contractual arrangement thus creating a form of bifurcation of Miller Act liability.

Stated otherwise, if there is to be any recovery for service charges in the instant case, Petitioners urge that such recovery can only be as a result of the alleged direct contract relationship which the Court below found to exist between E.J.T. and Billows since that is the sole basis on which the Court below otherwise found E.J.T. and the sureties obligated to Billows at all. Since the only testimony or documentation cited by the Court

below to establish any direct agreement between E.J.T. and Billows were the letters of November 28, 1977 and December 1, 1977, of which neither contain any reference, direct or indirect, to service charges in any form, it is clear that recovery of the service charge cannot be supported under the express or implied contractual principle utilized to justify the result of the main claim. While it is undisputed that in *D&L, supra,* and *Continental, supra,* the Eighth Circuit held that the liability of the general contractor, sureties and materialman under the Miller Act is governed by the contract pursuant to which the materialman furnished materials to the subcontractor, that basic proposition can hardly accommodate the facts of this case where the materialman's recovery is in no way based on its underlying oral subcontract agreement with the subcontractor, Thomas.

If the Eighth Circuit's language in *D&L, supra,* and *Continental, supra,* is to be applied literally by this Court as it evidently was in the Court below, it would mean that this Court would approve and engraft upon the Miller Act the provision that service charges could be contractually governed by one contractual arrangement under circumstances where the person obligated for the service charges was not obligated by that same contract for the principal claim and indeed where he had no notice or means or awareness of such possible liability.

It is respectfully urged that the issue in this case involving a proper interpretation of the Miller Act has never been decided by this Court nor has this Court otherwise spoken precisely on the issue. Where this Court has spoken on the question of the proper interpretation to be afforded the Act such as in *F.D. Rich Co., Inc. v. United States Ex Rel. Industrial Lumber Co., Inc.,* 417 U.S. 116 (1974), by holding that recovery

of attorneys fees was not a part of Miller Act relief to be granted under the statutory language "sums justly due", but would only be granted pursuant to express contractual provisions, this Court has lent support to Petitioners' contentions. The *Rich* case itself dealt with recovery under a specific subcontract agreement sued on and it is respectfully submitted that such past limitations of the United States Supreme Court on the statutory language "sums justly due" be carefully reviewed by this Court and applied to prevent recovery of the service charges from Petitioners created by the separate oral subcontract agreement between Thomas and Billows in the instant case.

II.

The Court Below Committed Error In Its Findings And Holding That A Direct Contractual Relationship Existed Between The Materialman Billows And The General Contractor E.J.T. And Was Entered Into On Or About December 1, 1977 Thereby Relieving The Materialman Of The Ninety Day Notice Requirement Of The Miller Act Contained At 40 U.S.C. § 270b(a) And Thereby Contractually Obligating The General Contractor E.J.T. To The Materialman Billows.

In the second and third Complaints (but not the initial Complaint) which were filed on December 1, 1978 and March 19, 1979 respectively, Billows sought for the first time to assert the existence of a direct contractual relationship with E.J.T., since by that time Billows had failed to provide proper Miller Act notice to recover under the 90 day written notice requirement of the Act.

This result is distressing since it is quite clear from all of the testimony that E.J.T. at all times dealt only with and through its subcontractor, Thomas, and Thomas in turn would deal with Billows and the issuance of the joint check for $29,528.78 was entirely consistent with its on-going agreement to make payments under the Thomas subcontract by joint checks to Thomas and Billows and did not constitute the establishment of a direct contractual relationship. Factually, this is borne out by *inter alia* (1) the continuing presence of Thomas on the job until the end, (2) the continuing submission of invoices from Billows to Thomas and the ordering of all material from Billows by Thomas, (3) the submission of monthly statements by Billows to Thomas on a continuing basis, and (4) the delivery of a Miller Act notice letter approximately one week later and the filing of suit on February 16, 1978 by Billows against E.J.T. which aside from creating an adversary relationship did not even allege at the time the existence of a direct contractual relationship between Billows and E.J.T.

E.J.T. urges that this case is closest factually to the decision of the 10th Circuit in *United States v. Hesselden Construction Co.*, 404 F.2d 774 (10th Cir. 1968), which established that a joint checking procedure such as implemented here by E.J.T. does not have the effect of placing a supplier in such a direct contractual relationship with the general contractor so as to eliminate the need for ninety day notice requirements under the Miller Act and that the purpose of such a procedure is simply to permit the materialman to satisfy his material bills from joint checks so that the materialman relies upon the credit of the general contractor and acquires a measure of control over funds to pay his invoices. In full accord with *Hesselden, supra,* are *United States v. Liles Construction Company,* 440 F.2d 474 (5th Cir. 1971), and

United States v. Van de Riet, 316 F.2d 912 (4th Cir. 1963).

It is respectfully submitted that under any application of the facts in the instant case to the Miller Act that a direct contractual relationship did not exist between E.J.T. and Billows. Petitioners recognize that this Court typically does not exercise jurisdiction in disputed fact situations. However, should this Court exercise its jurisdiction to correct the improper Miller Act holding of Argument I, *supra*, then Petitioners believe the contract issue should also be reviewed by this Court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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July 2, 1982

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action Nos. 78-528,
78-4032, 79-1024

[Filed: July 10, 1981]

UNITED STATES OF AMERICA
FOR THE USE OF
BILLOWS ELECTRIC SUPPLY COMPANY, INC.

v.

E.J.T. CONSTRUCTION CO., INC.
AND
NATIONAL FIRE INSURANCE COMPANY OF HARTFORD
AND
AMERICAN CASUALTY COMPANY OF READING
AND
B.D. THOMAS COMPANY

MEMORANDUM

BRODERICK, J. July 9, 1981

These actions, which arose under the Miller Act, 40 U.S.C.A. § 270a, *et seq.*, were tried together before the Court, sitting without a jury, on April 20 and April 21, 1981. The defendants E.J.T. Construction Company, Inc. (the General Contractor), National Fire Insurance Company of Hartford (National), and American Casualty

Company of Reading (American) were represented by the same counsel. Prior to the commencement of trial, defendant B.D. Thomas Company (the Subcontractor) settled with the plaintiff Billows Electric Supply Company, Inc. (the Materialman) and the other defendants. The issues to be decided by the Court are whether the Materialman complied with the notice provisions of the Miller Act, 40 U.S.C.A. § 270b, and if so, whether the Materialman is entitled to recover the unpaid balance for any or all of the materials it supplied to the Subcontractor, together with service charges on the unpaid balance.

At trial the parties stipulated that on or about June 26, 1975, the United States of America, acting through the Department of the Navy, Navy Facilities Engineering Command (Navy), and the General Contractor entered into a written contract whereby the General Contractor agreed to furnish all of the labor and material and perform all work required for the construction of a project known as the aircraft maintenance hangar and parking apron at the Naval Air Station, Willow Grove, Pennsylvania. The original contract was for the sum of $6,087,768.00. On or about June 26, 1975, the General Contractor as principal and National and American as sureties executed a payment bond and performance bond to the United States of America in reference to said project. These bonds were duly accepted by the United States of America, and upon acceptance the contract for the construction of the aircraft maintenance hangar and parking apron at Willow Grove, Pennsylvania was awarded to the General Contractor. All of the labor to be performed and materials to be furnished under this contract were to be supplied within the jurisdiction of the United States District Court for the Eastern District of Pennsylvania.

The parties further stipulated that the General Contractor and the Subcontractor entered into a written agreement whereby the Subcontractor agreed to furnish certain supervision, equipment, labor and materials required for the installation of all electrical work and all associated accessories in accordance with the plans and specifications of the contract between the Navy and the General Contractor. The original contract between the General Contractor and the Subcontractor, dated August 29, 1975, was for the sum of $600,500. The Navy, however, issued a total of approximately thirteen change orders to the General Contractor for certain additional work as the contract progressed, some of which involved the Subcontractor. The Materialman supplied material ordered by the Subcontractor for this subcontract, and has not been reimbursed for some of this material.

The Subcontractor testified that the electrical subcontract required him to supply certain kinds of electrical material for the job. The Subcontractor contacted the Materialman, a supplier of electrical equipment with whom he had previously done business, to obtain price quotations for the equipment and supplies needed for the job. The Materialman orally quoted prices for the electrical supplies and equipment and stated that these prices would not be increased for 90 days. The Subcontractor incorporated these prices into his bid and subsequently bought 70-75% of these materials from the Materialman within 90 days. The Subcontractor testified that the terms of payment for these materials was 2%/10, net 30 and a service charge of 1½% per month on any unpaid balance due for more than 60 days. The Subcontractor continued to buy material from the Materialman after the 90 day period had expired, and paid approximately the same price for the materials as

was quoted to him by the Materialman. The Subcontractor testified that the last order he placed with the Materialman for material for the hangar job was delivered to the job site on or about November 21, 1978. The Materialman and the Subcontractor never entered into a written contract for any of the materials purchased, and testified that this practice was customary among electrical suppliers and electrical subcontractors.

The Subcontractor made prompt payments to the Materialman for materials he ordered until sometime in late 1976, when payments began to fall in arrears. Early in 1977, the General Contractor began to pay the Subcontractor for its work by issuing monthly checks on which the Subcontractor and the Materialman were joint payees. The Subcontractor would forward these checks to the Materialman after he had endorsed them. The Subcontractor testified that in November 1977, the Materialman informed him that he would not accept any further orders from him until the outstanding balance of approximately $60,000.00 was paid.

The Materialman testified that in November 1977 he spoke directly to the General Contractor and advised him that he was not accepting any further orders for material from the Subcontractor until the balance on the Subcontractor's account was paid. Shortly thereafter, the Materialman received a check from the General Contractor in the amount of $29,528.78, to be applied to the balance due. The Materialman testified that he agreed to continue to send materials to the job site pursuant to an agreement with the General Contractor. The Materialman sent a letter to the General Contractor (Exhibit "P-2") confirming this agreement on December 1, 1977. This letter stated:

Confirming our phone conversation of today, 12-1-77, we discussed the letter dated 11-28-77.

The agreement made by yourself with me is that we get an initial payment of $29,528.78 immediately. This has been received and a payment of $10,000 every 30 days thereafter against the old balance on the B.D. Thomas account. The account now shows a balance of $30,673.85. All material shipped from here will be paid for within 30 days after the delivery.

If there is anything I can do to help, please contact me immediately. I am pushing now for a better delivery on the D.C. Rectifiers.

The Materialman testified that he resumed shipments to the job site but received no further payments from the General Contractor. The Materialman introduced into evidence 141 invoices (Exhibits "P1-1 through 1-141") for electrical supplies sent to the job site for which he claimed that payment had not been received. The earliest shipment date on these invoices is July 21, 1977, and the latest shipment date is November 21, 1978. The Materialman did not ship any material to the job site between August 1978 and November 21, 1978. The Materialman testified that the total balance of these invoices is $50,634.58, and that a service charge of 1½% per month ($38,583.38) has accrued on this unpaid balance.

On December 8, 1977 and January 17, 1979 the Materialman sent letters to the General Contractor, National, American and the Subcontractor demanding payment of the outstanding balance. The Materialman filed complaints against these defendants on February 16, 1978, December 1, 1978 and March 19, 1979.

A materialman must commence an action under the Miller Act before "the expiration of one year after the day on which the last of the . . . material was supplied by him." 40 U.S.C.A. § 270b(b). Section 270b(a) further requires that a materialman having a direct contractual relationship with a subcontractor but no express or implied contractual relationship with the general contractor must provide the general contractor with written notice of his claim within 90 days of the date on which the materialman supplied the last of the material for which the claim is made. *Id.* § 270b(a);[1] *United States ex rel. Pomona Tile Manufacturing Co. v. Kelley*, 456 F.2d 148 (9th Cir. 1972); *United States ex rel. State Electric Supply Co. v. Hesselden Construction*

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[1] Section 270b(a) provides:

> Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. . . .

Co., 404 F.2d 774 (10th Cir. 1968); *United States ex rel. Greenwald-Supon, Inc. v. Gramercy Contractors, Inc.*, 433 F. Supp. 156 (S.D.N.Y. 1977). However, the 90 day notice required under the Act and the one year time period within which an action must be instituted are measured from the last date that the Materialman delivered materials to the job site which were included in the construction contract, and not from the last date on which repair or replacement items were delivered to the job site. The furnishing of materials "for the purpose of correcting or repairing defects in work already done does not toll" the notice periods of the Miller Act. *Gramercy, supra,* at 162; *United States ex rel. Noland Co. v. Andrews,* 406 F.2d 790 (4th Cir. 1969); *United States ex rel. Austin v. Western Electric Co.*, 337 F.2d 568 (9th Cir. 1964); *United States ex rel. Lank Woodwork Co., Inc. v. CSH Contractors, Inc.*, 452 F. Supp. 922 (D.D.C. 1978). Since the November 21, 1978 shipment of material by the Materialman to the job site was the only shipment by the Materialman within 90 days of its notice letter dated January 17, 1979, this Court must initially determine whether the material delivered to the job site on November 21, 1978 was included in the construction contract and/or a change order, or was supplied to repair or replace material which had been previously furnished. The burden is on the Materialman to prove that the material delivered to the job site on November 21, 1978 was included in the construction contract and/or a change order. *United States ex rel. Edwards & Co. v. Peter Reiss Construction Co., Inc.*, 174 F. Supp. 264 (E.D.N.Y.), *aff'd*, 273 F.2d 880 (2d Cir. 1959), *cert. denied*, 80 S. Ct. 864 (1960); *see United States ex rel. Soda v. Montgomery*, 253 F.2d 509 (3d Cir. 1958).

Both the Materialman and the Subcontractor testified that the material delivered to the job site on November 21, 1978 was an explosion proof receptacle and plug for a public address system. The Subcontractor testified that this receptacle and plug were items which were included in the construction contract and/or a change order and were not repair or replacement items. Mr. Alan Shea, who was a construction representative for the Navy at the job site, testified that the public address system installed on the job site was operational in December 1977 and was accepted by the Navy when it beneficially occupied the job site in December 1977. He further stated that the public address system malfunctioned in the summer of 1978 and, as a result, the explosion proof receptacle and plug for the public address system were repaired or replaced sometime thereafter. On the basis of the evidence heretofore discussed, the Court finds that the Materialman has failed to carry its burden of proving that the items delivered to the job site on November 21, 1978 were included in the construction contract and/or a change order. The notice letter of the Materialman dated January 17, 1979 was therefore not timely under the section 270b(a) because it was not delivered within 90 days of the furnishing of the last material by the Materialman which was included in the construction contract and/or a change order.

As previously stated, the record shows that the Materialman sent appropriate notice letters on December 8, 1977 and January 17, 1979. The General Contractor admits that in August 1978 the Materialman supplied materials for the job which were included in the construction contract and were not repair or replacement materials. Therefore, the action filed by the Materialman on February 16, 1978 was untimely and affords the Materialman no right of recovery because it was filed

before the Materialman furnished the last of the materials under the construction contract for which it claims payment. 40 U.S.C.A. § 270b(a); *Marmet Corp. v. Frank Briscoe Co.*, 382 F.2d 906 (6th Cir. 1967). The action filed by the Materialman on December 1, 1978 relies on a last delivery date for material of August 10, 1978, but no notice letter was sent by the Materialman within 90 days of August 10, 1978. Section 270b(a), however, also provides that a materialman need not comply with the 90 day notice provisions of that section if the materialman has entered into a "contractual relationship express or implied" with the general contractor. 40 U.S.C.A. § 270b(a); *Hesselden, supra.* Since the Materialman filed two actions within one year of its furnishing of the last material included in the construction contract, 40 U.S.C.A. § 270b(b), the Materialman is not barred from recovery by the 90 day notice provision of section 270b(a) if there was a contractual relationship between it and the General Contractor.

As previously stated, from some time early in 1977 until approximately November 1977 the Materialman received payment for materials supplied to the job site by checks issued each month by the General Contractor which were jointly payable to the Subcontractor and the Materialman. In November 1977, the Materialman notified the General Contractor that it would not extend further credit to the Subcontractor and that no further orders would be accepted for the job until the unpaid balance was paid. The Materialman and the General Contractor then entered into an agreement, the terms of which were confirmed by a letter dated December 1, 1977 from the Materialman to the General Contractor. As previously stated, this letter acknowledged receipt of $29,528.78 from the General Contractor and stated

that the General Contractor agreed to pay the Materialman $10,000.00 every thirty days until the unpaid balance on the subcontractor's account, which was $30,673.85 after receipt of the $29,528.78 check, was paid. The letter also stated that the General Contractor agreed to pay for any future orders of material for the job site within thirty days after delivery. The Materialman received no further payments from the General Contractor. The General Contractor acknowledged that he conferred with the Materialman in November 1977, that he sent a check to the Materialman at that time for $29,528.78, and that he received the Materialman's December 1, 1977 letter and did not reply. On the basis of this evidence, the Court finds that the Materialman and the General Contractor, on or about December 1, 1977, entered into a "contractual relationship," and that the Materialman is therefore relieved from the 90 day notice requirement of section 270b(a). *Gramercy, supra.*

The Subcontractor testified that all of the materials ordered by it for which the Materialman has not been paid (Exhibit P1-1 through 1-141) were installed on the job site. As previously stated, the Materialman testified that the total balance of the 141 invoices for which payment has not been received is $50,634.58. The Court therefore finds that the Materialman is entitled to recover $50,634.58 for these materials. *Pomona Tile, supra.*

The Materialman may also recover for the service charges which accrued on the unpaid balance of the Subcontractor's account. Each bill of the Materialman to the Subcontractor stated that a service charge of 1½% per month would be imposed on any unpaid balances outstanding for more than sixty days. The Materialman testified that its records showed an accumulated service charge of $38,583.38. The General Contractor contends

that it is not liable for the service charge, but did not dispute the amount of the service charge which had accrued. In *D&L Construction Co. v. Triangle Electric Supply Co., Inc.*, 332 F.2d 1009 (8th Cir. 1964), the Eighth Circuit held that the liability of the general contractor and sureties to a materialman under the Miller Act is governed by the contract pursuant to which the materialman furnished materials to the subcontractor. In this action, each of the Materialman's bills to the Subcontractor specifically provided that a service charge of 1½% per month would be imposed on balances outstanding for longer than sixty days. The Court therefore finds that the Materialman may recover the service charge in the amount of $38,583.38. *D&L Construction, supra*; *Continental Casualty Co., Inc. v. Allsop Lumber Co., Inc.*, 336 F.2d 445 (8th Cir. 1964).

For the reasons set forth in this Memorandum, the Court will enter a verdict and judgment in favor of the Materialman and against the General Contractor, National and American in the amount of $89,217.96, which represents $50,634.58 for materials for which the Materialman did not receive payment and $38,583.38 for the service charges which accrued on the Subcontractor's account. This Memorandum is in lieu of findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a). An appropriate order will accordingly be entered.

[Caption Omitted In Printing]

ORDER

AND NOW, this 9th day of July, 1981, the Court, having made findings of fact and conclusions of law in favor of the plaintiff, Billows Electric Supply Company, Inc., in this non-jury action, as set forth in the Court's Memorandum dated July 9, 1981, hereby ORDERS that a verdict is ENTERED in favor of the plaintiff, Billows Electric Supply Company, Inc. and against the defendants, E.J.T. Construction Company, Inc., National Fire Insurance Company of Hartford, and American Casualty Company of Reading, in the amount of $89,217.96;

AND IT IS FURTHER ORDERED that in accordance with the Court's verdict, judgment is ENTERED in favor of the plaintiff, Billows Electric Supply Company, Inc., and against the defendants, E.J.T. Construction Company, Inc., National Fire Insurance Company of Hartford, and American Casualty Company of Reading, in the amount of $89,217.96.

/s/ RAYMOND J. BRODERICK, J.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action Nos. 78-528,
78-4032, 79-1024

[Entered: August 13, 1981]

UNITED STATES OF AMERICA
FOR THE USE OF
BILLOWS ELECTRIC SUPPLY COMPANY, INC.

v.

E.J.T. CONSTRUCTION CO., INC.
AND
NATIONAL FIRE INSURANCE COMPANY OF HARTFORD
AND
AMERICAN CASUALTY COMPANY OF READING
AND
B.D. THOMAS COMPANY

ORDER

AND NOW, this 12th day of August, 1981, after review of the Motions of Defendants for a New Trial or for Additional and Amended Findings of Fact and for Amended Judgment, and Memorandum in support thereof; and after consideration of Plaintiff's Response in opposition thereto, it is ordered that Defendants' Motions for New Trial or for Additional and Amended

Findings of Fact and Amended Judgment are hereby DENIED.

By the Court:

/s/ RAYMOND J. BRODERICK, J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2572

[Dated: May 3, 1982]

UNITED STATES OF AMERICA FOR THE USE OF
BILLOWS ELECTRIC SUPPLY COMPANY, INC.

v.

E.J.T. CONSTRUCTION CO., INC. AND
NATIONAL FIRE INSURANCE COMPANY OF HARTFORD
AND AMERICAN CASUALTY COMPANY OF READING
AND B.D. THOMAS COMPANY

(D.C. Civil No. 78-0528)

UNITED STATES OF AMERICA FOR THE USE OF
BILLOWS ELECTRIC SUPPLY COMPANY, INC.

v.

E.J.T. CONSTRUCTION CO., INC. AND
NATIONAL FIRE INSURANCE COMPANY OF HARTFORD
AND AMERICAN CASUALTY COMPANY OF READING
AND B.D. THOMAS COMPANY

(D.C. Civil No. 78-4032)

UNITED STATES OF AMERICA FOR THE USE OF
BILLOWS ELECTRIC SUPPLY COMPANY, INC.

v.

E.J.T. CONSTRUCTION CO., INC. AND
NATIONAL FIRE INSURANCE COMPANY OF HARTFORD
AND AMERICAN CASUALTY COMPANY OF READING
AND B.D. THOMAS COMPANY

(D.C. Civil No. 79-1024)

E.J.T. Construction Co., Inc. and
National Fire Insurance Company of
Hartford and American Casualty Company of Reading,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued: March 30, 1982

Before: GIBBONS, SLOVITER and BECKER, *Circuit Judges*

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Attorneys for Appellee

JUDGMENT ORDER

In this Miller Act case, E.J.T. Construction Co. and its sureties appeal from a judgment in favor of Billows Electric Supply, Inc., a materialman. The trial court's finding that Billows and E.J.T. entered into a direct contractual relationship is not clearly erroneous, and the court did not commit legal error in requiring payment of service charges on delayed payments.

It is ORDERED and ADJUDGED that the judgment of the district court is affirmed. Costs are taxed in favor of appellee.

By the Court,

/s/ JOHN GIBBONS
Circuit Judge

Attest:

/s/ Sally Mrvos
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2572

[Dated: May 27, 1982]

United States of America, etc. v. E.J.T. Construction Co., Inc., et al.

(D.C. Civil No. 78-0528)

United States of America, etc. v. E.J.T. Construction Co., Inc., et al.

(D.C. Civil No. 78-4032)

United States of America, etc. v. E.J.T. Construction Co., Inc., et al.

(D.C. Civil No. 78-1024)

E.J.T. Construction Co., Inc. and National Fire Insurance Company of Hartford and American Casualty Company of Reading,

Appellants

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges

who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ JOHN GIBBONS
Judge

Office - Supreme Court, U.S.
FILED
AUG 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

E.J.T. CONSTRUCTION CO., INC., AND NATIONAL FIRE INSURANCE COMPANY OF HARTFORD AND AMERICAN CASUALTY COMPANY OF READING,
Petitioners

v.

UNITED STATES OF AMERICA FOR THE USE OF BILLOWS ELECTRIC SUPPLY COMPANY, INC.
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Howard J. Creskoff
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August 4, 1982

THE LEGAL INTELLIGENCER, 10TH AND SPRING GARDEN STREETS, PHILA., PA 19123 (215) 238-2000

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the lower court correctly determined that a direct contractual relationship existed between the General Contractor, E.J.T. and the Materialman, Billows, thereby permitting the Materialman to recover as a Miller Act claimant without providing 90 days notice, and obligating the General Contractor and sureties to the Materialman.

II. Whether the court below properly interpreted and applied the Miller Act language of "sums justly due" by permitting the Materialman to recover unpaid sums and service charges under the Miller Act from the General Contractor and sureties pursuant to the terms agreed upon in the contract between the Subcontractor and the Materialman, Billows.

DESIGNATION OF CORPORATE RELATIONSHIP

Billows Electric Supply Company, Inc., Respondent in this proceeding, filed this Brief in Opposition to Petition for Writ of Certiorari and states that:

1. This is the original designation of corporate relationships.

2. Billows Electric Supply Company, Inc. is not owned by any parent corporation.

3. Billows Electric Supply Company, Inc. does not have any ownership interest in any subsidiary.

4. Billows Electric Supply Company, Inc., does not have any affiliates.

August 4, 1982

TABLE OF CONTENTS

	Page
Counterstatement of Questions Presented for Review	i
Designation of Corporate Relationship	ii
Opinions Below	1
Jurisdiction	2
Statutory Provisions	2
Counterstatement of Case	2
Counterstatement of Facts	3
Argument	7
I. The Court Below Correctly Found As A Factual Matter, Concordant With Prevailing Law, That A Direct Contractual Relationship Existed Between The Contractor, E.J.T. And The Materialman, Billows, Which Allowed Billows To Recover As A Miller Act Claimant	7
II. The Lower Court Properly Interpreted The Miller Act Language Of "Sums Justly Due" By Finding As A Factual Matter That The General Contractor, E.J.T., Had Agreed To Be Bound By The Terms Of The Subcontractor's Contract With The Materialman And, Therefore, Was Responsible For Contractually Imposed Service Charges	9
Conclusion	11

TABLE OF AUTHORITIES

Page

Cases:

Continental Casualty Co., Inc. v. Allsop Lumber Co., Inc., 336 F.2d 445 (8th Cir., 1964) 9

Continental Casualty Co. v. United States for Use and Benefit of Robertson Lumber Co., 305 F.2d 794 (8th Cir. 1962) 7

D & L Construction Co. v. Triangle Electric Supply Co., Inc., 332 F.2d 1009 (8th Cir. 1964) 9

United States v. H. R. Morgan, Inc., 554 F.2d 164 (5th Cir. 1977) 10

United States, ex rel Greenwald-Supon, Inc. v. Gramery, Inc., 433 F.Supp. 156 (1977) 7, 10

Statutes:

40 U.S.C. §270b(a) et. seq. (1976) 2
40 U.S.C. §270b(a)(1976) 9

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

E.J.T. CONSTRUCTION CO., INC., AND NATIONAL FIRE INSURANCE COMPANY OF HARTFORD AND AMERICAN CASUALTY COMPANY OF READING,
Petitioners

v.

UNITED STATES OF AMERICA FOR THE USE OF BILLOWS ELECTRIC SUPPLY COMPANY, INC.,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CETIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Billows Electric Supply Company, Inc., the Respondent herein, respectfully prays that the Petition for a writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit be denied.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is unreported and is printed in Appendix C of the Petition, and the Opinion of the United States District Court for the Eastern District of Pennsylvania is unreported and is printed in the Appendix of the Petition for Writ of Certiorari at Appendix A, page 1a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTORY PROVISIONS

The pertinent provision of the Miller Act is set forth in the Petition at pp. 2-3.

COUNTERSTATEMENT OF THE CASE

A. Nature of the Case and Summary of the Proceeding Below

Billows Electric Supply Company, Inc. (hereinafter "Billows"), a materialman on a United States of America contract, brought three separate Miller Act (40 U.S.C. §270b(a) et. seq.) actions against the General Contractor of the project, E.J.T. Construction Company, Inc. (hereinafter "E.J.T."), the Sureties on the project, National Fire Insurance Company of Hartford and American Casualty of Reading (hereinafter "the Sureties") and a subcontractor, B.D. Thomas Company (hereinafter "B.D. Thomas"), to recover monies owing to it for materials sold and delivered to the job site. The actions were consolidated prior to trial. Also prior to trial, B.D. Thomas settled with E.J.T.

On April 20 and 21, 1981, plaintiff's cases were tried to the Court, sitting without a jury, against the remaining defendants, E.J.T. and the Sureties (collectively known as the "Defendants").

The predominate issue presented at trial was whether Billows complied with the notice proviso of the Miller Act, or, in the alternative, whether it had a direct contractual relationship with the General Contractor, E.J.T., thereby rendering only the notice proviso of the Miller Act inapplicable. Contingent upon Billows suc-

cessfully establishing itself properly before the Court as a Miller Act claimant, the second issue presented was whether the Defendants were responsible for the one and one-half percent (1½%) per month service charge Billows imposed upon the unpaid balance for material sold and delivered.

The Court found that Billows did not satisfy the notice proviso of the Miller Act, but that it did have a direct contractual relationship with the General Contractor. The Court also held the Defendants responsible for the one and one-half percent (1½%) per month service charge Billows imposed upon the balance.

Thus, on July 9, 1981, the Court issued a Memorandum in Lieu of Findings of Fact and Conclusions of Law pursuant to Federal Rules of Civil Procedure 52(a) and in accordance with that Memorandum, on the same date, issued an Order entering a verdict and judgment in favor of Billows against the Defendants in the amount of Eighty-nine Thousand Two Hundred and Seventeen Dollars and Ninety-six Cents ($89,217.96). On July 20, 1981, Defendants filed a Motion for New Trial for Additional and Amended Findings and for Amended Judgment, which Motion was denied by the Court on August 12, 1981. Defendants appealed the Trial Court's determination to the United States Court of Appeals for the Third Circuit, which, after oral argument, affirmed. A Petition for Rehearing was presented to the United States Court of Appeals for the Third Circuit, and rehearing was denied. This matter has received unusual judicial scrutiny, in that it has had four separate reviews (twice in the District Court and twice in the United States Court of Appeals for the Third Circuit). Each Court has found in favor of Billows.

B. Counterstatement of Facts

A portion of the facts of this case was stipulated to during the course of the trial which stipulation was incorporated into the Trial Court's Memorandum. Those

facts established, *inter alia*, that Billows did in fact supply material for this project, that it was not reimbursed for some of the material supplied, that the Sureties executed a payment and performance bond to the United States of America in reference to the project, that the bonds were accepted by the United States of America, and that B.D. Thomas was hired by E.J.T. to be the electrical subcontractor on the project pursuant to a written agreement in the original amount of Six Hundred Thousand Five Hundred Dollars ($600,500.00).

Mr. Brian Thomas, the principal of Subcontractor B.D. Thomas, testified that the electrical subcontract required his company to supply certain kinds of electrical material for the job and that pursuant to that requirement, he contacted Billows, a supplier of electrical equipment with whom he had previously done business, to obtain oral price quotations, and subsequently, ordered and received delivery of various electrical equipment from Billows. The terms of payment for the electrical equipment were two percent (2%) discount if paid by the tenth of the month, net amount due within 30 days, and one and one-half percent (1½%) per month service charge on any unpaid balance due for more than 60 days.

B.D. Thomas made prompt payments to Billows and took advantage of the two percent (2%) discount for materials ordered and delivered until sometime in late 1976 when payments began to fall in arrears.

Commencing in late 1976 or early 1977, General Contractor E.J.T. began to experience difficulties with the electrical subcontract part of the project. These difficulties were caused by Billows' reluctance to continue to deliver materials to Subcontractor, B.D. Thomas, because of the large, outstanding balance he had with Billows.

Billows and E.J.T. spoke about the difficulties and decided that the best method for avoiding future delivery delays would be to institute a procedure pursuant to

which E.J.T. would issue monthly checks payable to Billows and Subcontractor, B.D. Thomas. Under that procedure, E.J.T. received copies of invoices from either B.D. Thomas or Billows on a monthly basis, and after verification, E.J.T. directed a joint check to B.D. Thomas for endorsement and transmittal to Billows.

Eventually, Billows informed B.D. Thomas that it could no longer accept further orders until the outstanding balance was paid. Billows also directly contacted E.J.T. to advise it of the difficulty it was experiencing in obtaining payment from B.D. Thomas and that Billows could no longer accept further orders from B.D. Thomas until the balance on the account was paid.

As a result of their communications, Billows and E.J.T. entered into an agreement providing for Billows to continue to ship the material to the job site in exchange for E.J.T. making payments against the old balance of the B.D. Thomas account and for making payments for new orders. The agreement between E.J.T. and Billows was first confirmed in a letter dated November 28, 1977 from E.J.T. to Billows. That agreement was modified, however, after further communications, which modified agreement was confirmed in a letter dated December 1, 1977, from Billows to E.J.T.

The written agreement, as modified in writing, provided that Billows would receive an initial payment of Twenty-nine Thousand Five Hundred Twenty-eight Dollars and Seventy-eight Cents ($29,528.78) from E.J.T., which payment was in fact received, that E.J.T. would make payments of Ten Thousand Dollars ($10,000.00) every 30 days against the old balance on the B.D. Thomas account and that all materials shipped subsequent to December 1, 1977, would be paid for within 30 days after delivery.

Pursuant to the agreement, Billows once again commenced shipment of materials to the job site for installation by B.D. Thomas but Billows received no further payments from E.J.T.

At trial, there was no dispute as to the delivery of the materials evidenced by the unpaid invoices nor to the amounts of the unpaid invoices and calculation of service charges. Disputed, however, was whether Billows properly sent Miller Act 90 day notice letters to E.J.T. and whether Billows and E.J.T. had entered into a direct contractual relationship thereby obviating the need to comply with the 90 day notice letter requirement.

Though Billows caused to be mailed to the Defendants, by registered mail, two separate Miller Act notice letters, one on December 8, 1977 and one on January 17, 1979, the Trial Court found that the timing of the letters failed to satisfy the statutory requirement that a notice letter be sent within 90 days of the last date material included within the original contract was delivered to the job site. The first notice letter was found to be sent prior to the last delivery of materials under the contract, and the second notice letter was found to be sent more than 90 days after the shipment of the last materials to be delivered under the original contract. The second letter was sent, however, within 90 days of the shipment of material which the Trial Court found to be repair or replacement items.

However, since the Court found a direct contractual relationship between Billows and E.J.T. it correctly concluded that the Miller Act was still applicable, and that Billows was entitled to recover the amount of the unpaid invoices plus service charges thereon.

ARGUMENT

I.

The Court Below Correctly Found As A Factual Matter Concordant With Prevailing Law, That A Direct Contractual Relationship Existed Between The Contractor, E.J.T. And The Materialman, Billows, Which Allowed Billows To Recover As A Miller Act Claimant.

The issue presented in this case is not of "sweeping significance". On the contrary, this case turns upon its own facts and will affect only the litigants. The issues raised at trial, on appeal, and again in the Petition for Certiorari, relate to purely factual questions which the lower court and U.S. Court of Appeals for the Third Circuit decided in conformance with the prevailing law.

The prevailing law holds that if a materialman enters into a direct contractual relationship with a general contractor, the materialman may recover from the general contractor the amount of invoices unpaid by the subcontractor as a Miller Act claimant, and without satisfying the 90 day provisio. *Continental Casualty Co. v. United States for Use and Benefit of Robertson Lumber Co.*, 305 F.2d 794 (8th Cir.) *cert. denied*, 371 U.S. 922 (1962) *United States, ex rel Greenwald-Supon, Inc. v. Gramery Contractors, Inc.*, 433 F.Supp. 156 (S.D.N.Y. 1977). The lower court determined that a direct contractual relationship existed between the general contractor, E.J.T. and the materialman, Billows. Accordingly, Billows was able to recover from the general contractor even if he failed to provide E.J.T. with 90 days notice.

The court below did not commit error when it found that a direct contractual relationship existed between E.J.T. and Billows. At trial, Respondent Billows introduced a great deal of evidence and testimony which supports the court's determination that a relationship existed.

The testimony of one of E.J.T.'s principals established that in 1976 Billows had its first communication with E.J.T., that E.J.T. received copies of invoices either from the sub-contractor or Billows on a monthly basis and that Billows had established communications with E.J.T. in order to commence a joint check procedure. The joint check procedure was established, but in 1977 Billows again had to speak directly to E.J.T. to advise it that the joint check procedure was not working, and of his decision not to supply material to the subcontractor until the account was paid. The discussions ultimately resulted in E.J.T. issuing a twenty-nine thousand, five hundred twenty-eight dollars and seventy-eight cent check ($29,528.78) to be applied to the subcontractor's balance (which included service charges to date), and correspondence was exchanged between Billows and E.J.T. to confirm their understandings. There are additional facts, which are amply set forth in the lower court's opinion found in the Petition's Appendix, at page 1a.

Based upon the above facts, the lower court determined that a contract existed between E.J.T. and Billows. Clearly this evidence was more than sufficient to support the lower court's holding. In the end, the lower court made a purely factual determination. No amount of strained semantics on petitioner's part can transform this case into anything other than a factual dispute. The court determined that a contractual relationship existed. That was the determinative issue, for once that conclusion was reached, Billows could recover under the Miller Act without providing 90 days notice. An issue such as the one resolved in this case does not warrant review by this Honorable Court.

II.

The Lower Court Properly Interpreted The Miller Act Language of "Sums Justly Due" By Finding As A Factual Matter That The General Contractor, E.J.T. Had Agreed To Be Bound By The Terms Of The Subcontractors Contract With The Materialman And, Therefore, Was Responsible For Contractually Imposed Service Charges.

Under the Miller Act, the claimant is entitled to all "sums justly due". 40 U.S.C. §207b(a). The phrase "sum or sums justly due" has been judicially defined to include service charges contractually imposed on past-due invoices. *Continental Casualty Co., Inc. v. Allsop Lumber Co., Inc.*, 336 F.2d 445 (8th Cir. 1964), *cert. denied*, 379 U.S. 968 (1964); *D & L Construction Co. v. Triangle Electric Supply Co., Inc.*, 332 F.2d 1009 (8th Cir. 1964). The law further holds that the liability of the general contractor and sureties to a materialman under the Miller Act is governed by the contract between the subcontractor and materialman. *Id.* Moreover, in this case the lower court found, as a fact, that E.J.T. had agreed to be bound by the same contractual terms as the subcontractor.

The lower court found that "[e]ach bill of the Materialman to the subcontractor stated that a service charge of one and one-half percent per month would be imposed on any unpaid balance outstanding for more than sixty days." Appendix to Petition for Certiorari, at page 11a. The court then held the general contractor and sureties liable for the service charges.

The Miller Act provides two methods by which a materialman is entitled to recover from the general contractor: (i) by sending the general contractor a 90-day notice letter; or (ii) by having a direct contractual relationship with the general contractor. The reason for these two requirements is to allow the general contractor to withhold payments to the subcontractor in order to satisfy the claim asserted by the materialman. *United*

States, ex rel Greenwald-Supon, Inc. v. Gramery Contractors, Inc., 433 F.Supp. 156 (1977).

The fact that Billows was properly before the lower court under the direct contractual relationship aspect of the Miller Act, rather than under the 90-day notice aspect, should not affect the amount of Billows' recovery. Indeed, both the lower court and the Court of Appeals have agreed on this point. The 90-day proviso is merely an additional notice requirement, but it does not affect the scope of the financial coverage of the payment and performance bond. *United States v. H.R. Morgan, Inc.*, 554 F.2d 164 (5th Cir. 1977). Accordingly, the court below correctly concluded that Billows was entitled to service charges as part of its "sums justly due", just as it would have been if it were claiming under the 90-day notice provision.

The conclusion reached by the lower court does not involve any misinterpretation of the Miller Act, expansion of law, or conflicting decision. The court merely applied the law as formulated and enunciated by other Circuit Courts.

It is respectfully submitted that, in light of the careful judicial screening this case has withstood, its limited scope, and its correct application of prevailing law, this case is not one demanding review by this Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully prays this Petition for Certiorari be denied.

RESPECTFULLY SUBMITTED,

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No. 82-2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

E.J.T. CONSTRUCTION CO., INC.
AND
NATIONAL FIRE INSURANCE COMPANY OF HARTFORD
AND
AMERICAN CASUALTY COMPANY OF READING,

Petitioners,

v.

UNITED STATES OF AMERICA
FOR THE USE OF
BILLOWS ELECTRIC COMPANY, INC.,

Respondent.

PETITIONERS' REPLY BRIEF ON CERTIORARI

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TABLE OF CONTENTS

Page

REPLY TO ARGUMENT II 1

CONCLUSION 4

TABLE OF AUTHORITIES

Cases:

Continental Casualty Co., Inc. v. Allsop Lumber Co., Inc., 336 F.2d 445 (8th Cir. 1964) 2

D & L Construction Co. v. Triangle Electric Supply Co., Inc., 332 F.2d 1009 (8th Cir. 1964) 2

F. D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc., 417 U.S. 116 (1974) 3

Statutes:

40 U.S.C. § 270b(a)(1976) 3

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REPLY TO ARGUMENT II

Petitioners vigorously dispute the twin pronouncements made at page 9 of the Brief in Opposition to the Petition for Certiorari by Respondent that the law holds that liability of a general contractor and sureties to a materialman under the Miller Act is governed by the contract between the subcontractor and materialman and that the District Court in this case found as a fact

that Petitioner, E.J.T., had agreed to be bound by the same contractual terms as the subcontractor. Petitioners briefly review these two contentions *seriatim*.

As emphasized in Argument I of its Petition for a Writ of Certiorari, Petitioners urge that no court has ever construed the Miller Act to hold that where recovery on the main claim is permitted on the basis that a direct contract existed that *ipso facto* that direct contract will incorporate by reference all of the provisions of a subcontract agreement to which the prime contractor now being charged under a direct contract was never a party. Indeed, where as here the so-called terms were oral and were confirmed in writing only by submissions to the subcontractor (Thomas) with whom the subcontract was made such an incorporation by reference contention is absurd. Such a result is not supported by either of the cases cited by the District Court and Respondent for that proposition, *D & L Construction Co. v. Triangle Electric Supply Co., Inc.*, 332 F.2d 1009 (8th Cir. 1964), and *Continental Casualty Co., Inc. v. Allsop Lumber Co., Inc.*, 336 F.2d 445 (8th Cir. 1964). We repeat that the obvious distinction between *D & L, supra* and *Continental, supra,* and the facts of this case is that in those cases, the Eighth Circuit permitted recovery of prejudgment interest where such recovery was in conjunction with a recovery pursuant to the same subcontract. In this case, to the contrary, the Court below has permitted recovery of a principal claim under an alleged direct contract and recovery of the service charges here complained of pursuant to a completely separate oral contractual arrangement thus creating a form of bifurcation of Miller Act liability previously unknown. Petitioners urge this Court to reverse the findings of the District Court as affirmed by the Third

Circuit in order to prevent a serious, severe, unintended and potentially far reaching interpretation of the scope of the language "sums justly due" under the Miller Act (40 U.S.C. § 270b(a)).

The second contention of Respondent at page 9 of its Argument II that the lower court (District Court) found as a fact that E.J.T. agreed to be bound by the same contractual terms as its subcontractor is not supported either directly or by any implication in any finding made by the Court Below. Indeed if such a finding had been made there could be no contention of emasculation and expansion of the Miller Act. It is clear that the Court Below incorrectly interpreted and then relied on *D & L Construction, supra* and *Continental, supra* and that it never made a finding that E.J.T. as a part of the alleged direct contract relationship which the Court Below found to exist agreed to (or was even aware of) the service charges.

Petitioners respectfully urge that this Court adhere to its prior interpretations of the statutory language "sums justly due" as enunciated in cases such as *F. D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116 (1974), and prohibit recovery of the service charges by Respondent and reverse the Court Below's improper interpretation of the Miller Act in this case.

CONCLUSION

For the reasons set forth in the Petition for a Writ of Certiorari and for the reasons set forth in this Reply Brief, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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